SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.
C.A. No. 04L-10-101 RRC

Submitted: June 16, 2006
Decided: August 31, 2006

Decision After Non-Jury Trial
Judgment for Plaintiff/Counterclaim Defendant Commonwealth Construction Co. and against Defendant/Counterclaimant Cornerstone Fellowship Baptist Church, Inc.

Dear Counsel:

This is the decision of the Court after a non-jury trial that arose from a mechanic's lien and *in personam* complaint filed by Plaintiff/Counterclaim Defendant Commonwealth Construction Co. ("Commonwealth").[1]

[1] Although Commonwealth also asserted a claim for *quantum meruit*, "[i]f there is an enforceable contract between the parties, *quantum meruit* recovery is inapplicable."

Defendant/Counterclaimant Cornerstone Fellowship Baptist Church, Inc. ("the Church" or "Cornerstone"), responded with a counterclaim against Commonwealth predicated principally on grounds of fraud and breach of contract.

Commonwealth, as a general contractor engaged in the construction business, won a bid to renovate an existing building and to convert it into a place of worship to be owned and used by Cornerstone. The two parties then entered into an agreement, which is the centerpiece of this litigation. However, during the course of the project both parties began to take issue with the other's performance under the contract. This tension culminated in Commonwealth's suspension of work on the project and the subsequent filing of the instant mechanic's lien and the parties' respective claims of breach of contract.

During the nine-day trial, which was spread out over a month, both parties introduced many exhibits and presented numerous facts, many of which were disputed. This is a hotly contested case, as is evidenced by the briefs, and the Court has done its best to sift through the mountain of facts to state only those facts that are particularly relevant to each parties' claims. As a result, this Court, after applying the applicable law, finds in favor of Commonwealth on its claim for a mechanic's lien. This Court also finds in favor of Commonwealth on its breach of contract claim because Commonwealth has shown by a preponderance of the evidence that Cornerstone materially breached the contract by failing to comply with the payment provisions and for failing to submit claims to the Architect, a condition precedent under the Agreement. On the other side, this Court does not find that Cornerstone has proved its claim for breach of contract by a preponderance of the evidence. Further, this Court finds that Cornerstone has not proven its fraud claim by a preponderance of the evidence. Therefore, judgment is entered in favor of Commonwealth in the amount of $251,031 on the mechanic's lien and $115,311 on the breach of contract claim.

Middle States Drywall, Inc. v. DMS Properties-First, Inc., 1996 WL 453418, * 10 (Del. Super.).

I. FACTS AND PROCEDURAL HISTORY

a. Standard of Review

As a threshold matter, this Court states the standard under which it has considered the evidence and reached its verdict. In doing so, the Court "applies the customary Delaware standard to the trial testimony."[2] The Court

> must judge the believability of each witness and determine the weight given to all trial testimony. [The Court] considered each witness's means of knowledge; strength of memory and opportunity for observation; the reasonableness or unreasonableness of the testimony; the motives actuating the witness; the fact, if it was a fact the testimony was contradicted; any bias, prejudice, or interest, manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the believability of the testimony.
>
> After finding some testimony conflicting by reason of inconsistencies, [the Court] has reconciled the testimony, as reasonably as possible, so as to make one harmonious story of it all. To the extent [the Court] could not do this, [it] gave credit to that portion of the testimony which, in [its] judgment was most worthy of credit and disregarded any portion of testimony which, in [its] judgment, was unworthy of credit.[3]

The Court finds the following facts to be determinative in this case.

b. The Project

This litigation centers around a project to renovate and convert an existing building located at 20 West Lea Boulevard in Wilmington, Delaware, into a place of worship to be occupied by Cornerstone. Commonwealth, as a general contractor in the construction industry, was solicited by Desmond Baker, P.E., a design professional employed by Endecon, Inc., an engineering and architectural company, to bid on the project. Based on the design documents prepared under Baker, Commonwealth submitted a bid of approximately $1,680,000, which turned out to be the low bid, and Commonwealth was awarded the project. After Commonwealth submitted its initial proposal mapping out the schedule for the construction of the project, Cornerstone requested that the project be divided into three phases. The principal impetus for such a request was a

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[2] *Dionisi v. Di Campli*, 1995 WL 398536, * 1 (Del. Ch.).

[3] *Id.* This tracks the pattern jury instruction in civil and criminal cases.

concern on the Church's part regarding funding for the entire project. On November 20, 2002, Commonwealth submitted a proposal for the first phase of the project, the proposed cost of which was $1,237,000. Cornerstone accepted that proposal for Phase I. Then, Commonwealth and Cornerstone entered into a written agreement, which was dated February 15, 2003.

c. The Agreement and the Start of the Project

The agreement executed by the parties on February 15, 2003, was the 1997 A101 Standard Form of Agreement Between Owner and Contractor ("Agreement"), which is promulgated by the American Institute of Architects ("AIA").[4] Attached to and adopted by reference into the Agreement, is AIA Document A201-1997 General Conditions of the Contract for Construction ("General Conditions").[5] Included in the overall Agreement are the "Contract Documents," which consist of the Agreement, the General Conditions, drawings, specifications, and other modifications or amendments.[6] This Agreement provided the framework for what was to become a very close relationship between the parties.

As with many contracts, this Agreement could be modified at any time by the parties. The principal instrument of change under the Agreement was a Change Order ("CO"), which would initially begin as a Change Order Proposal ("COP"). These Change Orders were one of the more formal means of communication between the parties and were used to modify the scope of work that was delineated by the Agreement.[7] Change Order Proposals were initiated by Commonwealth by sending a Request For Information ("RFI") to Desmond Baker, the design professional, when Commonwealth thought that the drawings or the intent of the design were not clear or where general changes to the design were necessary during the actual construction.[8] During the time that an RFI was pending, Commonwealth could not proceed with work on the part of the project that was the subject of the RFI, otherwise Commonwealth proceeded at its own risk.[9] When Commonwealth received a response to the RFI that required a change to the scope of work, Commonwealth then drafted a COP, which was

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[4] *See* Second Am. Compl., D.I. 20, Ex. B.
[5] *Id.*
[6] *See* General Conditions § 1.1.1.
[7] Testimony of David McCarthy 168-169 (Dec. 12, 2005).
[8] *Id.* at 165-166.
[9] *Id* at 165.

sent, along with complete documentary support to show additional material and labor costs, to Desmond Baker for review. Mr. Baker would then send the COP along with a recommendation as how to proceed to Denise Pearce, the project manager associated with Cornerstone.[10] Ms. Pearce, who had not been involved in the construction industry since 1995 except for this project, did not have any formal education in, among others things, construction management or estimating.[11] The COP, however, could not be formally processed until Ms. Pearce signed the COP, at which point it would be come an operative Change Order and it would formally modify the Agreement.[12] David McCarthy, project manager for Commonwealth, testified that there were 181 RFI's and 155 COP's, which resulted in 119 CO's.[13] Mr. McCarthy also testified that a project of similar size would generally generate 50 or 60 RFI's, 40 or 50 COP's and perhaps 20 CO's.[14] There is a dispute as to whether the large number of RFI's, COPs and CO's was the result of inconsistencies in the design documents prepared by Desmond Baker or "owner-initiated changes"[15] or the alleged inexperience of David McCarthy, the project manager for Commonwealth.[16] However, there is evidence that such the amount of RFI's and COP's on the project was a contributing factor in the delays of the project.[17] In fact, Commonwealth began billing Cornerstone for delays caused by changes to the design documents that were usually initiated by Cornerstone.[18] Additionally, there was also concern from the Cornerstone regarding what they believed were inconsistencies in the design documents.[19] As a result of these delays, Commonwealth incurred increasing direct costs associated with its business.[20] Benjamin Vinton, owner of Commonwealth, testified that the calculation of these additional general conditions constituted "the direct costs that are associated with putting men and equipment on the job."[21] Specifically, those costs included "salaries of a project manager and

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[10] Testimony of Desmond Baker 21 (Dec. 16, 2005).
[11] Testimony of Denise Pearce 27-28 (Dec. 22, 2005, p.m.).
[12] Testimony of David McCarthy 170 (Dec. 12, 2005).
[13] *Id.* at 166; Testimony of David McCarthy 12 (Dec. 13, 2005).
[14] *Id.* at 166-167; *Id.* at 12-13.
[15] Testimony of David McCarthy 12 (Dec. 13, 2005).
[16] Testimony of Desmond Baker 20 (Dec. 16, 2005).
[17] Memo from Tim Murphy to Denise Pearce (Feb. 26, 2004), at PX 14.
[18] PX23; PX 24; PX 25.
[19] Letter from Samuel Pratcher to Timothy Murphy (March 27, 2002), at PX 43.
[20] Testimony of Benjamin Vinton 60 (Dec. 14, 2005, a.m.).
[21] *Id.*

supervisor, the costs of toilets, telephones, dumpsters, temporary protection – anything that had to do with the site."[22]

One example of this process is the change in the construction schedule to accommodate the three phases of work. Phase I was designed primarily for the construction of the sanctuary. Phase II was for the construction for Fellowship Hall, which was to be located in the basement of the Church. And Phase III was to be the renovation and construction of the exterior. When Commonwealth and Cornerstone initially negotiated the Agreement, construction was to take place on a staggered schedule and the phases were to be done consecutively, not concurrently. The initial cost for Phase I of the project according to the Agreement was $1,237,000.[23] Thus, at the outset, the Agreement only provided for the work to be done in Phase I.[24] However, as construction of the Church progressed, on October 29, 2003, two COPs were processed that modified the Agreement to increase the scope of work to include Phases II and III as well.[25] Thus, at that point, the total cost under the Agreement (also indicated as the Contract Sum) increased to $2,272,476. Finally, the two parties executed two COs on December 12, 2003, that gave Cornerstone a $10,000 incentive for allowing Commonwealth to proceed with Phases II and III concurrently with Phase I.[26] Thus, via the Change Order process, on December 12, 2003, the scope of the work had decreased and been allowed to run concurrently to the benefit of both parties, and the total Contract Sum had concomitantly decreased to $2,241,700. After all of the COs for the project were processed, the final Contract Sum was $2,345,640.

Going back to the Agreement itself, the scheduled date for commencement of the first phase of the project was stated in the Agreement as May 5, 2003; however, that date was contingent upon "permitting and financing processes."[27] Before the project was to begin, however, problems began to appear with the process of obtaining the necessary permits. That process is explained in greater detail in the General Conditions to the Agreement. First, it is the responsibility of the owner, in this case Cornerstone, to provide all "surveys describing physical characteristics,

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[22] *Id.*
[23] Agreement Art. 4.1, at PX 3.
[24] *Id.* at Art. 4.2.
[25] CO 18, at DX 18; CO 19, at DX 19.
[26] CO 32 and CO 33, at DX 31.
[27] Agreement Art. 3.1, at PX 3.

legal limitations and utility locations for the site of the Project[.]"[28] With these documents in hand, it was then the duty of the contractor to compare the Contract Documents furnished by the owner and the design professional, Desmond Baker, with any other relevant documents "for the purpose of facilitating construction by the Contractor and [] not for the purpose of discovering errors, omissions or inconsistencies in the Contract Documents[.]"[29] It then became the duty of the Contractor to apply for the appropriate permits. Section 3.7.1 of the General Conditions states that "the Contractor shall secure and pay for the building permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded."

Prior to May 14, 2003, Commonwealth, pursuant to the Agreement, and after receiving all of the necessary paperwork from Cornerstone and Desmond Baker, submitted the drawings to the City of Wilmington and applied for the building permits.[30] However, this is part of the story where events start to work against the smooth and successful completion of the project. Upon receipt of the application, the City advised that a survey be done of the property. The survey revealed that the portico that, according to the design document, was to be constructed on the front of the building would intrude into the front setback. The City requested that before construction could proceed Cornerstone must request and receive a variance, which would excuse the setback requirement. On May 21, 2003, the City issued a demolition permit to Commonwealth, which then commenced the demolition portion of Phase I on May 28, 2003. Section 2.2.2 of the General Conditions provides that "the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction …" The Church apparently assigned the task of obtaining the to the design professional, Desmond Baker, but it seems that the first knowledge that he had concerning the need for a variance, and that he was responsible for obtaining the variance, was on August 1, 2003, more than two months after the scheduled commencement date.[31] Mr. Baker's role, as architect, during

[28] General Conditions § 2.2.3 at PX 4

[29] *Id.* at § 3.2.1 at PX 4.

[30] Minutes of Meeting (May 14, 2003), at PX 79 (indicating that at the time of a pre-construction meeting on May 14, 2003, the building permit application was still pending with the City of Wilmington).

[31] Letter from Denise M. Pearce to Desmond Baker (Aug. 1, 2003), at PX 88.

the course of the construction is as Owner's representative.[32] However, Mr. Baker submitted the paperwork for the variance, which was granted, and Commonwealth was able to obtain the necessary permit to begin construction for Phase I on August 8, 2003.[33]

Earlier, on June 26, 2003, Commonwealth submitted proposals for the construction of Phases II and III of the project to Cornerstone. Cornerstone later wrote on September 12, 2003, to Commonwealth to say that it intended to accept the proposal.[34] Then, as noted above, on October 29, 2003, the parties executed Change Orders 18 and 19, which modified the Agreement such that Phases II and III were to be performed concurrently with Phase I by Commonwealth. Those COs formally modified the Agreement. Then, to prepare for construction of Phases II and III, Commonwealth applied for the necessary permits, and received a building permit from the City of Wilmington for the two phases on December 11, 2003.[35]

d. The Claims Procedure Under The Agreement

As described above, the Agreement entered into by the two parties controlled their conduct. The Agreement also describes the procedures designed to avoid litigation when issues arise. Section 4.4.1 of the General Conditions provides that any claims arising under the Agreement should be submitted to the Architect, who in this case was Desmond Baker. A claim is "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract."[36] A claim can also be "other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."[37] Although the Architect is the Owner's representative, there are safeguards against abuse by the Architect. Section 4.2.12 of the General Conditions states that "[w]hen making [] interpretations and initial decisions [regarding the Contract Documents], the Architect will endeavor to secure faithful

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[32] General Conditions § 4.2.1.

[33] Building Permit (Aug. 8, 2003), at PX 11.

[34] Letter from William J. Booth, III to Denise M. Pearce (June 26, 2003), PX 5; Letter from Donald E. Dunnigan and Samuel D. Pratcher to Tim Murphy (Sept. 12, 2003), PX 6.

[35] Building Permit (Dec. 12, 2003), DX 66.

[36] General Conditions § 4.3.1, PX 4.

[37] *Id.*

performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith." Moreover, § 4.4.1 of the General Conditions provides that an "initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due."

The relevant claims that were brought by Commonwealth during the course of the project and submitted to Desmond Baker as the architect concerned the unpaid Pay Applications, which are described in more detail below, additional general conditions resulting from alleged delays, parking lot paving issues and the plaster patching allowance. On November 15, 2004, Desmond Baker, as the Architect, denied Commonwealth's claim regarding the paving of the parking lot; then, on November 16, 2004, Mr. Baker also denied Commonwealth's claim that Cornerstone had delayed the project.[38] It is unclear whether Cornerstone ever submitted any claims to Desmond Baker as the Architect regarding any of the credits that Cornerstone claims Commonwealth owes to the Church.[39]

The Agreement also provides that "[i]f a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration."[40] As the procedural history will show, Commonwealth filed its claim for a mechanic's lien on October 27, 2004. Included in the complaint that stated the claim for the mechanic's lien was also a claim for breach of contract and *quantum meruit*, which, as indicated above, is not applicable here as there is an enforceable contract.

e. The Pay Applications

After the initial permitting problems, construction continued and throughout the course of the project, Commonwealth, in order to receive payment for work done, submitted various Pay Applications, pursuant to the General Conditions of the Agreement. Section 9.3.1 provides the procedure

[38] Pretrial Stipulation, D.I. 55, 4.
[39] Testimony of Desmond Baker 74-76 (Dec. 19, 2005, p.m.).
[40] General Conditions § 4.4.8.

for the submittal of pay applications and requires the Contractor to attach "such data substantiating the Contractor's right to payment as the Owner or Architect may require[.]" When a pay application was to be submitted, Commonwealth emailed a draft of each pay application to Ms. Pearce, who examined it and emailed it back to Commonwealth if the application needed clarification.[41] When Commonwealth submitted the final draft of the application, it hand delivered it to Ms. Pearce pursuant to an informal agreement or protocol between the parties which was designed to try to "expedite the process."[42] Once all of Ms. Pearce's questions were answered she would submit the application to Desmond Baker as the design professional for approval and certification.[43] Under the General Conditions, the

> issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents.[44]

The Architect has the power under the Agreement to withhold certification in whole or in part.[45] This power is subject to the safeguards referenced earlier in General Conditions section 4.2.12. The Agreement also provides:

> If the Architect does not issue a Certificate of Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect, … then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received.[46]

This provision allows the Contractor to stop work when it is not being paid.

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[41] Testimony of Denise Pearce 4 (Dec. 21, 2005).
[42] *Id.* at 6-7.
[43] *Id.* at 5.
[44] General Conditions § 9.4.2.
[45] *Id.* at § 9.5.1.
[46] *Id.* at § 9.7.1.

This process apparently worked satisfactorily until around the time that Pay Application 14 was submitted by Commonwealth; instead of hand delivering the final draft of the application to Ms. Pearce, Commonwealth mailed it to Cornerstone, which was in violation of the protocol.[47] Ms. Pearce testified that through Pay Application 14, all of payments made by Cornerstone to Commonwealth for work completed were timely.[48]

However, disputes arose in connection with Pay Applications 15, 17, 18 and 19. On August 4, 2004, Commonwealth submitted Pay Application 15 to Cornerstone on August 4, 2004, for payment for work that had been performed in July 2004 in the amount of $90,599.[49] Up to that point in time, the Contract Sum was $2,325,641.40, the total completed to date was $2,244,354, and the total retainage (constituting 10% of the completed work) was $224,436, which meant that the balance to finish, plus retainage, was $305,723.40.[50] Retainage is an amount held by the owner throughout the course of the project that "basically assures the owner that the project and the work is done properly."[51] At the time that Pay Application 15 was submitted, various Change Orders were still outstanding as they had not been approved by Cornerstone and/or Desmond Baker.[52] As Mr. McCarthy hoped to add the Change Orders, upon approval, to Pay Application 15, he asked Ms. Pearce to hold Application 15 until the resolution of the outstanding COs.[53] However, due to disputes by both parties as to the Change Orders, Pay Application 15 was not paid.[54] On August 24, 2004, Mr. McCarthy asked that Pay Application 15 be processed without the disputed COs, however, Ms. Pearce asked that the date of submission be changed to reflect the August 24 date instead of the August 4 date, to which Mr. McCarthy refused.[55] That disagreement is merely one example of the deteriorating relationship between the parties.

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[47] Testimony of Denise Pearce 6-7 (Dec. 21, 2005).

[48] *Id.* at 8; Testimony of David McCarthy at 66 (Dec. 13, 2005).

[49] Pay Application 15, at PX 19; *Id.* at 65, 68.

[50] Pay Application 15, at PX 19. This format of breaking down the different components of the work done and work left to be done under the contract is uniform throughout all of the pay applications at issue here.

[51] Testimony of David McCarthy 64 (Dec. 13, 2005).

[52] *Id.* at 66.

[53] *Id.* at 67-68.

[54] *Id.* at 68; Testimony of Denise Pearce 74 (Dec. 22, 2005).

[55] Testimony of David McCarthy 70-73 (Dec. 13, 2005).

The next application in dispute is Pay Application 17, submitted on August 27, 2004, which was for work Commonwealth performed through August 31, 2004, and totaled $60,552. David McCarthy testified that a number of the change orders, which were for work that had been completed in July 2004, that he had attempted to include in Pay Application 15 were instead included in pay Application 17.[56] However, on October 7, 2004, the parties met to discuss the issues surrounding Pay Applications 15 and 17 (Pay Application 16 was also in dispute, but was subsequently paid). Without recitation to any part of the record, Cornerstone says that it initially agreed to pay application 15, but not 17. There is indication, however, that Cornerstone did have some issues about credits it felt was due to the Church stemming from Application 17.[57] However, Commonwealth appears to have been under the impression that at that same meeting Cornerstone agreed to make payment on both applications 15 and 17, and in exchange Commonwealth would not submit a claim for interest.[58] Additionally, Desmond Baker testified at trial that he had the impression that an agreement had been reached at the meeting and that "the church was going to overrule me and pay."[59]

Intertwined with Pay Application 15 was the dispute regarding the paving work that was to be done by Commonwealth on the parking lot. Cornerstone disputed whether the paving of the parking lot had been done according to the design specifications and did not pay the $13,927 that Commonwealth had billed in Pay Application 15.[60] Denise Pearce wrote an email to Desmond Baker saying that Commonwealth had improperly billed the $13,927 and that Commonwealth's "plan is that they claim that you approved of these expenses, therefore substantiating" the claim of a 1-inch overlay.[61] David McCarthy, however, testified at trial that the $13,927 was not for any paving work that had been done, but "was to cover some sitework costs associated with regarding the front area and the side area and … some concrete for the ramp on the … east side of the building."[62] The dispute was whether Commonwealth owed Cornerstone a 3-inch tear-out and replacement of the parking lot or merely a 1-inch overlay over the

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[56] *Id.* at 96-97.
[57] Testimony of Denise Pearce 15 (Dec. 21, 2005, a.m.).
[58] Testimony of Benjamin Vinton 32 (Dec. 14, 2005, a.m.).
[59] Testimony of Desmond Baker 49-50 (Dec. 20, 2005, a.m.).
[60] Testimony of Denise Pearce 12 (Dec. 21, 2005).
[61] Email from Denise Pearce to Desmond Baker, at DX 17.
[62] Testimony of David McCarthy at 119 (Dec. 13, 2005).

existing pavement. The original design prepared by Desmond Baker called for the then-existing pavement in the 32,000 square foot parking lot to be torn out and replaced with 3 inches of Type C hot-mix, which is indicated by Sheet C-1 of Endecon's specifications and drawings.[63] However, on November 8, 2002, Commonwealth submitted a revised proposal that called for the "[r]ear parking lot to receive overlay paving in lieu of removal and replacement."[64] There was no indication as to the thickness of the overlay to be used. Then, on June 26, 2003, Commonwealth, in its proposal for Phases II and III, which included work to be done on the parking lot, stated that "[s]itework costs do consider the re-use of the existing paving as shown on drawing C-1."[65] Prior to that proposal, Commonwealth had received a bid from a subcontractor that was based on a 1-inch "overlay of the existing asphalt area[,]" however, Commonwealth apparently did not share that information with Cornerstone at that time.[66] This issue appeared to have been solved during an August 26, 2004, meeting, from which minutes were prepared on August 30, 2004, that state, "Listed below is the disposition of disputed items as agreed upon between [Cornerstone] and [Commonwealth]. Parking lot paving – Soft spots will be removed and reinforced and the entire lot will receive a 1" overlay."[67] However, there are instances in the record that indicate that Cornerstone still understood that "the specification indicates that the parking was to be graded and repaved with 3" of bituminous hotmix."[68] As can be seen above, this is another example of the acrimonious relationship that these two parties maintained during the last months of the project.

Moreover, Cornerstone decided not to pay application 17 because Desmond Baker advised the Church that he thought that there were several portions of the Project that had been paid for but not completed.[69] Thus, Mr. Baker did not certify the application pursuant to the Agreement, as is in his power to do. Denise Pearce also apparently believed that Cornerstone was entitled to certain credits that Commonwealth owed to the Church for work

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[63] PX 1.

[64] Letter from William J. Booth, III to John Willis, at 2 (Nov. 8, 2002), PX 40.

[65] Letter from William J. Booth, III to Denise M. Pearce (June 26, 2003), PX 5

[66] Letter from William J. Booth, III to Denise M. Pearce, at 2 (Aug. 20, 2004), PX 47.

[67] PX 81.

[68] Minutes of Meeting to Resolve Open Issues, at 1 (Sept. 3, 2004), DX 11. *See also* Notes of Meeting on Outstanding Issues, at 1 (Sept. 1, 2004), DX 20.

[69] Testimony of Desmond Baker at 88 (Dec. 16, 2005, p.m.)

that was included in the designs but either had not been completed by Commonwealth or the Church had done itself. At this point, construction and work on the project was nearly complete.[70]

On October 1, 2004, Commonwealth submitted Pay Application 18, which was for work done in September 2004.[71] The total for the work done in that month, as reflected in the application, was $25,678 and includes the billing of Change Orders for work that was performed before the end of July 2004.[72] Mr. McCarthy testified at trial that the work that was billed for in Application 18 had been completed.[73] This application is apparently still outstanding.[74]

As a result of these disputes, both parties attempted to meet in an effort to resolve some of the percolating issues. However, it may have been futile as tensions had already reached a head before the October 7, 2004, meeting. Even the meeting itself apparently left both parties with conflicting understandings as to what had been resolved. Commonwealth had begun hearing reports among the subcontractors regarding the Church's financial situation. Then, Commonwealth asked Cornerstone to provide information that demonstrated that the Church was able to pay the outstanding applications.[75] In the October 5, 2004, email, Benjamin Vinton, the owner of Commonwealth, also stated that "[if] this [information] is not furnished within seven days of this notice, [Commonwealth] will stop all work at the site." Under the Agreement, the "Owner shall, at the written request of the Contractor, prior to commencement of the Work or thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract."[76]

Cornerstone apparently did not supply the necessary paperwork and Commonwealth threatened to suspend work, pursuant to the Agreement, which also provides that "[f]urnishing of such evidence shall be a condition

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[70] Testimony of Benjamin Vinton at 39 (Dec. 14, 2005, a.m.).

[71] Pay Application 18, PX 28.

[72] *Id.*; Testimony of David McCarthy at 98-99 (Dec. 13, 2005).

[73] Testimony of David McCarthy at 99 (Dec. 13, 2005).

[74] *Id.*

[75] Email from Benjamin Vinton to Samuel Pratcher (Oct. 5, 2004), PX 32; Email from Benjamin Vinton to Desmond Baker (Oct. 14, 2004), PX 33.

[76] General Conditions at § 2.2.1.

precedent to commencement or continuation of the Work."[77] Around that same time, Mr. Vinton called Cornerstone's bank, without Cornerstone's knowledge, to inquire as to whether the outstanding pay applications were being processed.[78] The evidence shows that Commonwealth notified both Cornerstone and Mr. Baker of the impending work stoppage.[79] Finally, Commonwealth suspended work and left the job site on October 18, 2004. The main reason for the work stoppage was the failure of Cornerstone to have made payments for work that Commonwealth claimed had been performed.[80] Thus, Commonwealth stopped work pursuant to § 9.7.1 of the General Conditions, which is recited above. Then, on November 1, 2004, after Commonwealth had suspended work on the project, Commonwealth submitted Pay Application 19, which was for work that had been done in October, before the suspension occurred, as well as the remaining retainage.[81] The work that was performed totaled $33,108 and the remaining retainage is $117,766.00, which brings the total on Pay Application to $150,874.00.[82] At trial McCarthy testified as to all of the items that were billed on Pay Application 19.[83] To this date, Application 19 is still outstanding.[84]

f. The Plaster Patching Allowance and COP 129

As noted above, another of Commonwealth's claims is for a plaster patching allowance in the amount of $5,797.00.[85] Commonwealth is also seeking $623 in connection with Change Order Proposal 129.[86]

g. The Credits Sought By Cornerstone

Throughout the project, there were various disputes regarding credits that Cornerstone believed that it was owed by Commonwealth. One of the

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[77] *Id.* at § 2.2.1.
[78] Testimony of Benjamin Vinton 52 (Dec. 14, 2005, a.m.).
[79] PX 32; PX 33.
[80] *Id.*
[81] Pay Application 19, PX 29; Testimony of David McCarthy at 100 (Dec. 13, 2005).
[82] PX 29.
[83] Testimony of David McCarthy at 100-106 (Dec. 13, 2005).
[84] *Id.* at 106.
[85] Pl.'s Op. Br. 10.
[86] *Id.* at 11.

more contentious disputes that is pertinent to Commonwealth's claims here is the $20,000 total credit that Commonwealth offered to Cornerstone as an incentive to allow Commonwealth to proceed with Phases II and III concurrently, instead of consecutively. As noted above, both parties executed Change Orders 18 and 19 on October 29, 2003, to show that the Agreement had been formally modified.[87]

Moreover, Cornerstone has alleged all throughout the project that it is entitled to certain credits resulting from Commonwealth's alleged breach of the Agreement. These credits include incomplete work done by Commonwealth on the elevator, the HVAC system and the fire and security system. Other credits include various "permit allowances," certain procedures that need to be done to the HVAC prior to its successful completion, the incentive noted above, and removal of stage curtains, rods and lights that was apparently done by the volunteers at the Church. Cornerstone also claims credits for low estimates given to the Church by subcontractors; in those situations the Church apparently had to do the work later and for a higher price. Cornerstone was constantly engaged in ongoing negotiations with Desmond Baker in an effort to resolve these credits, but never submitted a formal claim to him.[88]

II. PROCEDURAL HISTORY

Commonwealth filed a Complaint on October 27, 2004.[89] Cornerstone then filed an answer with a counterclaim on November 29, 2004.[90] On November 4, 2005, both parties moved for partial summary judgment. Commonwealth argued that (1) under the Agreement, neither party is entitled to consequential damages, and (2) that Cornerstone is not entitled to damages related to claims against any subcontractors.[91] Cornerstone argued that it was entitled to partial summary judgment as to

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[87] DX 18, DX 19.

[88] Testimony of Desmond Baker 74-76 (Dec. 19, 2005, a.m.).

[89] The Amended Complaint was filed on November 23, 2004. The Second Amended Complaint, which is the operative complaint in this action, was filed on June 16, 2005.

[90] The Amended Answer was filed on December 22, 2004 and an Amended Affidavit of Defense was filed on December 29, 2004. The Third Amended Answer was filed on June 30, 2005. The Fourth Amended Answer was filed on July 25, 2005. It appears that no pleading styled as a Second Amended Answer was ever filed.

[91] Pl.'s Mot. Partial Summ. J., D.I. 43, 2, 3.

certain credits owed to the Church by Commonwealth.[92] On November 28, 2005, this Court denied Commonwealth's motion "for the reasons stated on the record[,]" but essentially for the reason that there were genuine issues of material fact that needed to be resolved at trial.[93] On that same day, this Court granted Cornerstone's motion in the amount of $2,426, but "denied [the motion] without prejudice as to all other relief requested for the reasons stated on the record."[94] Then, on November 29, 2005, Commonwealth filed two motions *in limine*. The first was to exclude all of Cornerstone's claims of fraud and the second was to exclude the testimony of the Church's experts. On the first day of trial, December 12, 2005, this Court deferred the first motion, upon the consent of the parties, to a later, more appropriate time, but granted Commonwealth's motion to exclude the testimony of the Church's experts since they had not been timely disclosed. The non-jury trial commenced on December 12, 2005, and recessed on December 21, 2005, due to the holidays and various vacations, until January 13, 2006, upon which the trial concluded. Both parties then submitted post trial briefs with accompanying appendices that contain exhibits that introduced at trial.

During the course of litigation and until the eve of trial, this Court attempted to set this case on a track for resolution at mediation instead of in the courtroom. The final, court-ordered pretrial mediation occurred on December 8, 2005, immediately before trial was to begin, but was unsuccessful.[95]

III. CONTENTIONS OF THE PARTIES

a. Commonwealth's Complaint

i. Commonwealth's Claim for Mechanic's Lien

Commonwealth brings two principal claims against Cornerstone. The first is a mechanic's lien and the second is an *in personam* claim based on breach of contract. First, as to the mechanic's lien, Commonwealth argues that it is entitled to a mechanic's lien for performance that "consisted of

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[92] Def.'s Mot. Partial Summ. J., D.I. 44, 1-2.

[93] *Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, Del. Super., C.A. No. 04L-10-101, Cooch, J. (Nov. 28, 2005) (ORDER).

[94] *Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, Del. Super., C.A. No. 04L-10-101, Cooch, J. (Nov. 28, 2005) (ORDER).

[95] Mediator's Report, D.I. 58 (Dec. 13, 2005).

demolition in preparation for construction, alteration and renovation of a structure to be used as a place of worship by Cornerstone, the owner of the property and structure."[96] Commonwealth claims that when Cornerstone began allegedly delaying payment before refusing to pay altogether, and Commonwealth "made repeated demand for payment and notified Cornerstone that if it refused make such payment [Commonwealth] would seek a mechanic's lien[,]"[97] Commonwealth then "perfected a mechanic's lien against the lands and structures of [the Church] upon the filing of the Statement of Claim of Mechanic's Lien."[98] Commonwealth asserts that mechanic's liens are statutory in nature, not equitable, and that judgment may be rendered if all of the statutory requirements are met.[99] Commonwealth contends that the "evidence presented at trial" demonstrates that "Commonwealth has satisfied the elements necessary to have a lien of judgment entered by this Court against the lands and structures of Cornerstone."[100] Further, Commonwealth argues that the judgment should be entered because "Cornerstone did not raise any technical defenses to Commonwealth's mechanic's lien."[101] Finally, Commonwealth argues that the mechanic's lien was not filed prematurely because the provisions of the Agreement provide that a mechanic's lien may be filed prior to a resolution through mediation or arbitration, as that course will take longer than the period of time needed to prefect a mechanic's lien.[102]

In response, Cornerstone contends that Commonwealth is not entitled to a mechanic's lien because "its application is not automatic, particularly under the circumstances here;"[103] instead, argues Cornerstone, "[a] mechanic's lien has an equitable character and its application should consider equitable principles."[104] As for the technical requirements for a mechanic's lien, Cornerstone disputes the day that work was commenced; while Commonwealth set forth a date of May 28, 2003, Cornerstone claims that the correct date is August 8, 2003.[105] Cornerstone argues that the May

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[96] Pl.'s Op. Br., D.I. 78, 12.
[97] *Id.*
[98] Pl.'s Reply Br., D.I. 86, 1.
[99] *Id.* at 2.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 2-3.
[103] Def.'s Ans. Br., D.I. 82, 9.
[104] *Id.*
[105] Def.'s Reply Br., D.I. 88, 1.

28, 2003, date only applies to demolition, which is not lienable under the mechanic's lien statute; thus, the commencement date should be August 8, 2003, which is when construction started.[106] Cornerstone asserts that as Commonwealth did not set forth the proper date of commencement, there is no way to know from what point the "judgment will run as to the structure[,]" and the mechanic's lien claim, presumably, would fail.[107] Moreover, Cornerstone argues that Commonwealth is not entitled to the mechanic's lien because there are valid issues regarding some of the payments due under the Agreement, such as failure to comply with the Agreement itself and delays in processing certain pay applications that are allegedly attributable solely to Commonwealth.[108] Finally, Cornerstone alleges that Commonwealth's filing of the claim for the mechanic's lien was premature as the Agreement called for mediation or arbitration before resorting to litigation.[109]

ii. Commonwealth's Breach of Contract Claim

Commonwealth sets forth three principal grounds in support of its claim that Cornerstone materially breached the Agreement. First, Commonwealth claims that Cornerstone failed "to fully compensate [Commonwealth] for work performed or materials supplied for which certificates of payment were issued[.]"[110] Specifically, Commonwealth alleges that the Church breached the Agreement by refusing to pay applications 15, 17, 18 and 19, as required under the Agreement.[111] As to Pay Application 15, Commonwealth argues that Cornerstone, at the October 7, 2004, agreed to pay the application in full, but then later deducted $13,927 from the payment because the paving had not been done.[112] Commonwealth responds that the application could not include paving as that had not been performed but that the $13,927 was for "sitework costs at the front and side of the building and included some concrete for the ramp on the east side of the building."[113] As for Pay Applications 17, 18 and 19, Commonwealth

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[106] *Id.*
[107] *Id.*
[108] Def.'s Ans. Br. 9.
[109] *Id.* at 10.
[110] Pl.'s Op. Br. 13.
[111] *Id.* at 14-18.
[112] *Id.* at 14.
[113] Def.'s Reply Br. 6.

argues that the "evidence presented at trial proved that [they] are entitled to payment of [the Applications] in full."[114]

Second, Commonwealth claims that it was delayed in commencing work because Cornerstone failed to perform its obligation under the contract of obtaining the necessary permits.[115] Commonwealth contends that the delay was the result of an error in the design prepared by Desmond Baker that showed that a portico extended into the setback, which caused the City of Wilmington to refuse to give Cornerstone the necessary permits to allow Commonwealth to begin work until a variance was obtained.[116]

Third, Commonwealth argues that Cornerstone breached the Agreement by delaying Commonwealth's progress in the project by Cornerstone's failure to approve plans and make decisions quickly enough.[117] Associated with this claim is the allegation that Denise Pearce, as the Church's representative, regularly interfered with Commonwealth's performance, which constitutes breach of the Agreement.[118] Specifically, Pearce's "'protocols' with which [Commonwealth] was forced to comply represent a violation of [Commonwealth's] right to carry out the work independently under the Agreement."[119] In that same vein, Commonwealth argues that the "behavior and interference of Denise Pearce as agent for Cornerstone fundamentally violates the implied covenant of good faith and fair dealing."[120] Commonwealth contends that this covenant obligated Cornerstone to act on issues concerning the project in a timely manner, as required under the Agreement.[121]

In response, Cornerstone refutes all of Commonwealth's grounds in support of Cornerstone's alleged breaches of the Agreement. First, as to the refusal to pay for completed work, Cornerstone argues that all of the payments that Commonwealth allege Cornerstone refused to pay were

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[114] Def.'s Ans. Br. 16.

[115] *Id.* at 19.

[116] Pl.'s Reply Br. 20.

[117] Pl.'s Op. Br. 20, 25 ("[T]he sheer number of changes to the Project initiated by Cornerstone and Endecon and Cornerstone's failure to act on RFI's, COP's and Change Orders led to delays in the completion of work."); Pl.'s Reply Br. 20-21.

[118] Pl.'s Op. Br. 21.

[119] *Id.* at 22.

[120] *Id.* at 25.

[121] *Id.* at 27.

disputed in good faith by Cornerstone and that, as such, the payments did not need to be made.[122] Specifically, the Church argues that Commonwealth "refused to recognize credits due, return materials that [the Church] purchased, acknowledge payment on significant Work that remained incomplete, and it demonstrated disrespect for the Owner."[123] As for Pay Application 15, Cornerstone contends that there was a concern on its part that the submission date was being manipulated by Commonwealth and that, after the October 7, 2004, meeting to resolve the pay applications, Cornerstone alleges that it discovered work that was not complete yet billed for in application 15.[124]

Second, as to Commonwealth's argument that Cornerstone breached the Agreement by causing the delay of the commencement of the project, the Church argues that Commonwealth "knew or should have known that it was to obtain a permit only for Phase I of the Project … [and that Commonwealth] messed up the permit application, even though the phases on the documents were delineated."[125] Cornerstone maintains that "[a]ny delay in the Commencement Date resulted from [Commonwealth's] failure to make proper application to the City for a building permit covering Phase I only."[126] Further, Cornerstone alleges that Commonwealth waived any right it had to damages due to delay because Commonwealth did not request a Change Order to extend the contract time.[127]

Third, as to Commonwealth's allegations that the Church breached the Agreement by delaying the performance of the project and acting in bad faith, Cornerstone responds Commonwealth "has not offered adequate supporting evidence to establish that an event cause[d] any delay sufficient enough to warrant additional payment[,]" and that it had legitimate reasons for questioning the pay applications submitted by Commonwealth, such as that the Church "had already paid more than the value of the contract."[128] Further, Cornerstone argues that the high number of RFI's, CO's and the

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[122] Def.'s Ans. Br. 10-11.
[123] *Id.* at 11.
[124] *Id.* at 12.
[125] *Id.* at 18.
[126] *Id.*
[127] *Id.*
[128] *Id.* 19, 25.

like "is not sufficient to establish a delay, particularly when the evidence showed that [Commonwealth] instigated almost all of them."[129]

c. Cornerstone's Affirmative Defenses

In its Fourth Amended Answer, Cornerstone pled several affirmative defenses in response to Commonwealth's Complaint. First, Cornerstone pled the defense of accord and satisfaction "as it has already paid [Commonwealth] more than it is entitled under the Agreement between the parties."[130] Specifically, Cornerstone alleges that it has paid $2,118,209 on a contract that is valued at $1,801,718.40.[131]

Second, Cornerstone pled fraud as an affirmative defense, setting forth at least six theories that Commonwealth was fraudulent: (1) that Commonwealth asked Cornerstone to hold onto Pay Application 15 and then incur a late fee, which was "done in an effort to establish evidence that Cornerstone was delinquent in making timely payments under the Agreement;"[132] (2) that Commonwealth failed to apply credits back to Cornerstone; (3) that although Cornerstone paid extra money so that the construction could be divided in phases, all three phases were done concurrently instead of consecutively and Commonwealth "deliberately delayed the project so as to justify keeping the extra payment;"[133] (4) that Commonwealth sought "extortionist" fees from Cornerstone when Cornerstone was in a weak position; (5) that Cornerstone paid Commonwealth for work that subcontractors had performed, but Commonwealth did not, in turn, give the payment to the subcontractors; and (6) that "the institution of this lawsuit, alleging breach of contract and non-payment, and misrepresenting facts in a complaint, is in and of itself a fraudulent act."[134]

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[129] Def.'s Reply Br. 8.
[130] Fourth Am. Ans. ¶ 26.
[131] Def.'s Ans. Br. 27.
[132] Fourth Am. Ans. ¶ 27.
[133] *Id.* ("The project … was delayed by [Commonwealth's] deceptive statements indicating that certain work had been performed when it had not been completed …").
[134] *Id.*

Third, Cornerstone pled that Commonwealth has "failed to state a claim upon which relief can be granted."[135] No other allegations were made concerning this affirmative defense.

In response to Cornerstone's fraud defense, Commonwealth argues that the Church has not plead with the requisite particularity as to time, place and the contents of the misrepresentation and that the claim should, thus, be dismissed.[136]

d. Commonwealth's Requested Damages

The damages that Commonwealth seeks in connection with the claim for a mechanic's lien are as follows: (1) for Pay Application 15, $13,927; (2) for Pay Application 17, $60,552; (3) for Pay Application 18, $25,678; (4) for Pay Application 19, $150,874; (5) for a plaster patch allowance, $5,797; and (6) for COP 129, $623. Thus, the total amount that Commonwealth seeks under its claim for a mechanic's lien is $257,451.[137]

Under its breach of contract claim, Commonwealth claims it is entitled to "extended general conditions associated with delays to the Project" caused by, among others, Cornerstone and its design professionals.[138] The total amount of general conditions sought by Commonwealth is $95,311. Finally, Commonwealth also seeks reimbursement of the $20,000 credit that it offered to Cornerstone as incentive to allow Phase II and Phase III to be completed concurrently.[139]

Thus, the total measure of damages sought by Commonwealth is $372,762. However, that is more than the amount sought in the Second Amended Complaint and, more importantly, the Pretrial Stipulation, which is $358,835. Commonwealth, in its reply brief, asks this Court to "amend the pleadings to conform to the evidence presented at trial."[140] Superior Court Civil Rule 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

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[135] *Id.* at ¶ 28.
[136] Pl.'s Op. Br. 28.
[137] Pl.'s Reply Br. 21.
[138] *Id.* at 10.
[139] *Id.* at 11.
[140] *Id.*

Cornerstone, however, argues that the difference between the two figures arises from Pay Application 19, where line 7 ("Less Previous Certificates For Payment (Line 6 from Prior Certificate)") has a figure of $2,204,439.[141] Cornerstone claims that the amount in Pay Application 19, line 7 should be $2,218,366, which is the figure indicated in Pay Application 18, line 6.[142] Although there appears to be a discrepancy between the two numbers on the face of the documents, the testimony of David McCarthy sufficient shows, by a preponderance of the evidence, that the "Current Payment Due" on Pay Application 19 is $33,108, not $19,181, as Cornerstone argues.[143] Therefore, this Court will amend the pleadings to indicate that Commonwealth's final measure of requested damages is $372,762.

Cornerstone also takes issue with Commonwealth's claim that it is entitled to $20,000, which constitutes the incentive that Commonwealth offered to Cornerstone for allowing Phases II and III to be performed concurrently.[144] However, that figure is included with the measure of damages that Commonwealth seeks in the Pretrial Stipulation and, thus, will also be included among Commonwealth's alleged measure of damages.[145]

B. Cornerstone's Counterclaims

a. Cornerstone's Breach of Contract Counterclaim

Cornerstone also filed a counterclaim against Commonwealth predicated on breach of contract. Cornerstone claims that Commonwealth owes Cornerstone the following: (1) $354,345.00 for outstanding items under the Agreement; (2) $260,357.38 for work performed under the contract by subcontractors that Commonwealth has not yet compensated; (3) $162,267.03 for work that Cornerstone had to give to someone else to complete the project; and (4) $196,522.50 for consequential damages.[146]

Cornerstone alleges that on "October 18, 2004, [Commonwealth] materially breached the contract [by] refusing to perform the Work."[147]

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[141] Def.'s Reply Br. 24.
[142] *Id.*
[143] Testimony of David McCarthy 100 (Dec. 13, 2005).
[144] Def.'s Reply Br. 25.
[145] Pretrial Stipulation, D.I. 55, 2.
[146] Fourth Am. Ans. ¶¶ 31, 32, 33. *See also* Pretrial Stipulation 4.
[147] Def.'s Ans. Br. 29.

Although Cornerstone recognizes that Commonwealth argues that the Church breached by not making payments pursuant to the Agreement, Cornerstone maintains that the "existence, however, of monetary damage does not necessarily dispose of the issue; as materiality must be determined in light of the facts of each case, so as to secure the expected exchange of performances."[148] Cornerstone invokes § 9.7.1 of the Agreement for the proposition that Commonwealth must give seven days written notice before stopping work on grounds of non-payment and that if such a stoppage occurs, then "the Contract Time and Contract Sum are extended accordingly and increased by reasonable costs."[149] Cornerstone seems to be alleging that Commonwealth did not wait the requisite seven days before stopping work.

Cornerstone also argues that Commonwealth breached the contract by filing the claim for a mechanic's lien prior to proceeding through the alternative dispute resolution process that is contemplated by the Agreement.[150] The filing of the mechanic's lien, alleges Cornerstone, is in direct contravention for the procedure for stopping work under the Agreement and, thus, is a breach.[151] Cornerstone also claims that Commonwealth breached the Agreement by failing to complete certain work in accordance with the Agreement.[152] Specifically, Cornerstone alleges that Commonwealth did not complete work on the elevator, the HVAC system and the fire/safety/security system.[153]

Further, Cornerstone argues that Commonwealth breached the Agreement by not recognizing certain credits owed to Cornerstone that would reduce the overall Contract Sum.[154] These credits, argues Cornerstone, arise through (1) permit allowances that should have been credited to the Church when construction was complete, (2) the $20,000 incentive offered to Cornerstone for completing Phases II and III concurrently, (3) the removal of stage curtains, rods and lights, (4) electrical work that was done in the Audio/Visual room, and (5) certain receptacles in the kitchen hood that were not installed by Commonwealth.[155] Cornerstone

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[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 30.
[153] *Id.*
[154] *Id.* at 31.
[155] *Id.* at 31-33.

argues that there is evidence, in the form of a September 27, 2004, letter from Ms. Pearce to Mr. Baker, that indicates that the Church had submitted claims to the Architect in accordance with the Agreement.[156]

Finally, Cornerstone argues that Commonwealth breached the contract by not making any legitimate attempts at resolving outstanding issues that had lingered for long periods of time "because in doing so, a reduction in the Contract Sum would necessarily occur."[157] These issues included the parking lot paving issue, an issue with a supposedly non-conforming roof, an issue with project phasing costs, plaster patch allowances requested by Commonwealth, disputed requests for general conditions, items that were not returned to the Church, and payments made by the Church to subcontractors.[158]

In response, Commonwealth relies on § 4.4.8 of the Agreement for the proposition that if a claim relates to a mechanic's lien, which Commonwealth filed in October 2004, then it may be filed before resolution of claims submitted to the Architect, by mediation or arbitration.[159] Further, Commonwealth claims that it gave sufficient notice of the intent to stop work if Cornerstone did not provide the necessary assurances after Commonwealth became concerned with Cornerstone's financial arrangements.[160] Moreover, Commonwealth argues that Cornerstone has waived any opportunity to claim that Commonwealth breached the Agreement by avoiding the alternative dispute resolution clauses when Cornerstone filed an answer and a counterclaim in response to Commonwealth's claim for a mechanic's lien and *in personam* action.[161]

As for the Church's claims that Commonwealth breached the Agreement by "refusing" to recognize credits owed to the Church, Commonwealth argues that Cornerstone "has forfeited its right to have its Claims considered by this Court[]" because Cornerstone failed to submit the claims for credits to the Architect before including them in this litigation.[162] Commonwealth cites to § 4.4.1 of the General Conditions for the proposition

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[156] *Id.* at 26.
[157] *Id.* at 34.
[158] *Id.* at 34-38.
[159] Pl.'s Reply Br. 3.
[160] *Id.* at 3-4.
[161] *Id.*
[162] *Id.* at 9.

that all claims must be submitted to the Architect, Desmond Baker, as a condition precedent to litigation or alternative dispute resolution.[163] Commonwealth contends that because Cornerstone never submitted any claims to the Architect, any claims that Cornerstone may have now cannot be considered by the Court.[164] In response to Cornerstone's proffer of the September 27, 2004, letter, Commonwealth claims that the letter refers to a request for additional information by Mr. Baker concerning Commonwealth's claim for delay, not to Cornerstone's own dispute submission.[165]

b. Cornerstone's Requested Damages

As a result of Commonwealth's stoppage of work prior to seeking mediation and arbitration, which Cornerstone alleges is a breach of contract, Cornerstone requests $798,676.26. This figure is broken down by Cornerstone into four categories: (1) outstanding items and credits back totals $354,345; (2) work completion totals $162,257.03; (3) consequential damages totals $149,298.50; and (4) subcontractor liability totals $95,967.73.[166]

Although the Agreement provides that there is a mutual waiver of consequential damages, Cornerstone argues that because Commonwealth did not terminate the contract in accordance with Article 14 of the Agreement, which requires work to stop for 30 days through no fault of the Contractor, the waiver does not apply.[167] Commonwealth argues that the "broadly inclusive" mutual waiver in § 4.3.10 is extended to situations where one party stops work or even terminates the contract.[168]

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[163] *Id.*
[164] *Id.* at 9, 11.
[165] *Id.* at 10.
[166] Def.'s Reply Br. 24.
[167] *Id.* at 11.
[168] Pl.'s Reply Br. 12.

IV. DISCUSSION

a. Commonwealth Is Entitled To A Mechanic's Lien For Its Work Done On The Church.

The general purpose of a mechanic's lien is to provide protection for contractors or other laborers who furnish labor or other services on a structure pursuant to a contract with its owners.[169] The issue here is whether Commonwealth satisfied the statutory requirements necessary to perfect a mechanic's lien on the Church. The relevant statute is 25 *Del. C.* § 2712(b), which provides, in pertinent part:

> (b) The complaint and/or statement of claim shall set forth:
>
> (1) The name of the plaintiff or claimant;
>
> (2) The name of the owner or reputed owner of the structure;
>
> (3) The name of the contractor…;
>
> (4) The amount claimed to be due … provided, that if the amount claimed to be due is fixed by the contract, then a true and correct copy of such contract, including all modifications or amendments thereto, shall be annexed;
>
> (5) The time when the doing of the labor or the furnishing of the materials was commenced;
>
> (6) The time when the doing of the labor or the furnishing of the material or the providing of the construction management services was finished …
>
> (7) The location of the structure with such description as may be sufficient to identify the same;
>
> (8) That the labor was done or the materials were furnished or the construction management services were provided on the credit of the structure;
>
> (9) The amount of plaintiff's claim (which must be in excess of $25) and that neither this amount nor any part thereof has been paid to plaintiff; and
>
> (10) The amount which plaintiff claims to be due him on each structure.
>
> (11) The time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon such structure which is granted to secure an existing indebtedness or future advances provided at least 50% of the loan proceeds are used for the payment of labor or materials, or both, for such structure.

[169] *See J.G. Justis Co. v. Spicer*, 95 A. 239 (Del. Super. Ct. 1915).

Delaware case law provides that this statute, as it is in derogation of the common law, must be construed strictly.[170] Strict construction, however, "does not mean unreasonable or unwarranted construction."[171] Instead, the Court need only determine whether the requirements of the statute have been "substantially complied with."[172]

Here, the only technical requirement that Cornerstone argues was not satisfied was subsection (5), which deals with the date of commencement of the labor or furnishing of materials.[173] In its Second Amended Complaint, Commonwealth states that the Commonwealth "began furnishing labor and materials to the Project on May 28, 2003."[174] The Church, however, alleges for the first time in its post trial Reply Brief, that Commonwealth was only providing demolition work at that time, which is not considered "erection, alteration or repair" under the statute.[175] Demolition work is not ordinarily lienable.[176]

Although Cornerstone is correct in its assessment of the law, this Court holds that Cornerstone has waived its right, asserted for the *first* time ever in its second post trial brief, to argue this defense to Commonwealth's claim for a mechanic's lien. Cornerstone's foregoing "defense" was not asserted in its Fourth Amended Answer, where in response to Commonwealth's assertion that May 28, 2003, was the commencement date, Cornerstone merely answered, "Denied."[177] Nor was this defense ever stated in the pretrial stipulation that was signed and submitted by both parties to this Court on November 30, 2005, less than two weeks before trial began. It was, to the Court's recollection, also never raised at trial and, as stated, was not even asserted in Cornerstone's first post trial brief as part of its argument

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[170] *Builder's Choice, Inc. v. Venzon*, 672 A.2d 1, 2 (Del. 1995).

[171] *Rockland Builders, Inc. v. Endowment Management, LLC*, 2006 WL 2053418, * 3 (Del. Super.) (quoting *Ceritano Brickwork, Inc. v. Kirkwood Indus., Inc.*, 276 A.2d 267, 268 (Del. 1971)).

[172] *Ewing v. Bice*, 2001 WL 880120, * 2 (Del. Super.).

[173] Def.'s Reply Br. 1.

[174] Second Am. Compl. ¶ 6.

[175] Def.'s Reply Br. 1 (citing *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.,* 642 A.2d 820 (Del. Super. Ct. 1993) (holding that demolition work is not lienable under the statute).

[176] *See Browning-Ferris*, at 829.

[177] Fourth Am. Ans. ¶ 6.

that "[Commonwealth] Does Not Have A Statutory Right To A Mechanic's Lien."[178]

The Delaware Supreme Court has held that where a defense to a claim is not pled or set forth in the pretrial stipulation, then that defense is waived.[179] Where such an omission occurs, "the plaintiffs [are] never put on notice that they needed to prepare to meet the inferences to be drawn from the facts supporting the defense."[180] Here, as Cornerstone failed to timely plead that Commonwealth included in part a claim for demolition expenses until its second post-trial brief, thus precluding Commonwealth from an adequate opportunity to respond to such an allegation, that defense is waived and will not be considered by the Court. Had Cornerstone raised this defense earlier, Commonwealth may have presented evidence differently at trial. It would have been unfair to Commonwealth for the Court to consider this defense.

Commonwealth's claim for a mechanic's lien, as noted above, can be broken down into six components: the four disputed pay applications (15, 17, 18 and 19); the plaster patch allowance; and COP 129. The Court will now examine each claim attached to the mechanic's lien.

First, as to Pay Application 15, this Court finds that Commonwealth has proven by a preponderance of the evidence that it has done the sitework that is listed on the Pay Application 15.[181] David McCarthy, project manager for Commonwealth, presented credible evidence regarding the sitework and testified that the work had been done.[182] Cornerstone did not put forth any evidence to show that the work had not been done. The Church merely cites to the email written by Denise Pearce that says that there is an issue.[183] Neither Ms. Pearce's nor Mr. Baker's testimony adds anything to Cornerstone's claim that Commonwealth improperly billed for the $13,927. In fact, Mr. Baker testified that he thought that the Church was going to pay the whole of Pay Application 15 after the October 7, 2004,

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[178] Def.'s Op. Br. 9.

[179] *Alexander v. Cahill*, 829 A.2d 117, 128-129 (Del. 2003) (holding that an affirmative defense is waived where defendant does not give notice of such a defense before or in the final pretrial stipulation).

[180] *Id.* at 128.

[181] Pay Application 15, at PX 19.

[182] *See* Testimony of David McCarthy 119 (Dec. 13, 2005).

[183] Email from Denise Pearce to Desmond Baker, at DX 17.

meeting.[184] In light of the fact that Commonwealth has put forth competent evidence that the work has been completed but not paid for, as well as the resolution that was reached on October 7, Commonwealth is entitled to the $13,927 billed for in Pay Application 15.

Second, as to Pay Application 17, this Court finds that Commonwealth has proven by a preponderance of the evidence that it had completed the work included in Application 17 in July of 2004. David McCarthy testified that the certain Change Orders from July 2004 were included in Pay Application 17. Moreover, Benjamin Vinton testified that he believed that, at the October 7, 2004, meeting, Pay Application 17 was to be paid "within the next several days after" applications 15 and 16.[185] Moreover, that conclusion is corroborated by the testimony of Desmond Baker who, as noted above, believed that the Church was going to pay the applications requested by Commonwealth. Therefore, Commonwealth has proven by a preponderance of the evidence that it is entitled to the amount indicated in Pay Application 17: $60,552.

Third, David McCarthy testified that Pay Application 18 had been submitted for work that was completed in September, but also included some of the change orders that had been done for work that had been performed before the end of July.[186] It does not appear that Cornerstone offers any testimony in rebuttal to Mr. McCarthy. Cornerstone does argue that because Desmond Baker, as the Architect, did not certify the applications as proof that the work had been done, pursuant to the General Conditions. However, the General Conditions also give Commonwealth the ability to stop work for non-payment of outstanding pay applications.[187] On October 27, 2004, Commonwealth stopped work in accordance with the Agreement, as will be shown below. At that point, Commonwealth had a viable claim for a mechanic's lien, of which it availed itself. At that point, any work that had been done, but for which Commonwealth did not receive payment was included into the claim for the mechanic's lien. The General Conditions also provide for the filing of a mechanic's lien prior to the resolution of an issue by the Architect. Regardless of the fact that Desmond Baker had not certified Pay Application 18, Commonwealth has shown by a

[184] Testimony of Desmond Baker 49-50 (Dec. 20, 2005, a.m.).
[185] Testimony of Benjamin Vinton 32 (Dec. 14, 2005, a.m.).
[186] Testimony of David McCarthy 99 (Dec. 13, 2006).
[187] General Conditions § 9.7.1.

preponderance of the evidence that it is entitled to payment for the work performed as billed in Pay Application 18. Thus, Commonwealth is entitled to $25,678.

Fourth, as to Pay Application 19, Commonwealth seeks $150,874, which is broken down into work performed totaling $33,108 and remaining retainage totaling $117,766. David McCarthy testified as to each of the components that comprises the work completed but not yet paid for.[188] Without citation to any factual support, Cornerstone argues that Pay Application 19 should not be considered because it was not submitted until after the claim for a mechanic's lien was filed.[189] The Court finds that claim to be irrelevant. Cornerstone also argues that the Pay Application was never certified, but that theory was rejected above. Thus, Commonwealth has demonstrated an entitlement beyond a reasonable doubt to the payments in Pay Application 19 for work completed under the Agreement in the amount of $117,766.

Fifth is Commonwealth's claim for a plaster patching allowance totaling $5,797. Sixth, Commonwealth seeks $623 from Change Order Proposal 129. Both of these are claimed as part of the mechanic's lien, however, Commonwealth sets forth no support in either of its briefs to substantiate the claim that the work was done by Commonwealth. Thus, Commonwealth has not proven by a preponderance of the evidence that it is entitled to those monies.

Other than the defense that the court, as discussed above, now finds has been waived, Cornerstone does not challenge the technical compliance of Commonwealth's claim for a mechanic's lien. Upon examination of Commonwealth's Second Amended Complaint, this Court finds that all of the statutory requirements of § 2712(b) are met. Therefore, based on the foregoing, this Court finds that Commonwealth has adequately pled its right to a mechanic's lien, to the extent indicated above. Commonwealth is entitled to a lien upon the structures and lands upon which the structures are situated of Cornerstone in the amount of $251,031.

[188] Testimony of David McCarthy 100-101 (Dec. 13, 2006).
[189] Def.'s Op. Br. 14.

b. Cornerstone Breached the Agreement

Generally, when an agreement between parties is reduced to writing, the plain language of the contract will be given its plain meaning.[190] "It is established Delaware law that in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance will all of the provisions of the contract."[191] Likewise, a party in material breach of the contract cannot then complain if the other party fails to perform.[192] Performance under a contract is justifiably excused when the other party to the contract commits a material breach.[193] Whether a breach is material is a fact-sensitive analysis.[194] Delaware has adopted the Restatement (Second) of Contracts as an aid to consider whether a breach is material; section 241 of the Restatement (Second) sets forth the following factors:

> a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Although a material breach may allow the non-breaching party to be excused from future performance, a non-material breach does not; instead, the non-breaching party may recover any damages that it can prove.[195]

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[190] *Phillips Home Builders v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. Super. Ct. 1997).

[191] *Eastern Elec. & Heating Co. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at * 4 (Del. Super.) (citing *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, 251 A.2d 571 (Del. Super. Ct. 1969)).

[192] *See Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166 (Del. Super. Ct. 1969).

[193] *See Eastern Elec.*, at * 4.

[194] *See SLMSoft.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, * 13 (Del. Super.).

[195] *See Daystar Constr. Management, Inc. v. Mitchell*, 2006 WL 2053649, * 7 (Del. Super.) ("[A] slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.").

Both parties set forth claims that the other party materially breached the contract. Commonwealth claimed that Cornerstone materially breached the contract by (1) "refusing" to make payments after pay applications had been submitted or agreed upon for work that had been completed, (2) delaying the commencement of the project, and (3) delaying the performance of Commonwealth under the Agreement. Cornerstone, on the other hand, claims that Commonwealth materially breached the Agreement by (1) "refusing" to complete work pursuant to the Agreement, (2) "refusing" to recognize credits owed to the Church when they became due, (3) "refusing" to resolve outstanding issues and (4) improperly stopping work and prematurely filing the mechanic's lien.

This Court finds that Commonwealth has proven by a preponderance of the evidence, through the credible testimony of its witnesses and the documents relied upon by Commonwealth, that (1) Cornerstone breached the Agreement when it delayed the commencement date in May 2003 by failing to have the proper variance by delaying Commonwealth's performance under the Contract, (2) Cornerstone materially breached the Agreement when it failed to pay Commonwealth for work completed under the Agreement, and (3) Cornerstone materially breached the Agreement by not submitting its claims to the Architect as a condition precedent to litigation. Finally, this Court also finds that, by a preponderance of the evidence, Commonwealth substantially complied with the Agreement in terms of the work completed under the contract, recognizing credits owed to the Church, as well as following the claims procedure set forth in the Agreement.

i. Cornerstone Delayed Commencement of the Project and Commonwealth's Performance under the Agreement.

As discussed above, it was Commonwealth's duty to compare the design documents that were developed by Desmond Baker with any other relevant documents "for the purpose of facilitating construction."[196] This was done so that Commonwealth would be able to comply with another duty, which is to secure all of the necessary permits for the phases of construction.[197] However, the evidence presented at trial showed that after

[196] General Conditions § 3.2.1.
[197] *Id.* at § 3.7.1.

Commonwealth applied for the construction permits, the City of Wilmington requested a survey, which revealed that the proposed portico would intrude into the setback and required a variance. Under the Agreement, it is the Owner's responsibility to "secure and pay for necessary approvals, easements, assessments and charges required for construction[.]"[198] This provision required Cornerstone to apply for and receive the variance needed for the portico, which they apparently delegated to Desmond Baker as the Architect. However, Mr. Baker did not receive the variance needed to begin construction on the project until August 8, 2003, more than two months after the expected commencement date. As a result, Commonwealth only received a demolition permit in May 2003 and could not begin construction until August 8, 2003. This delay is attributable to Cornerstone as it was the Church's duty under the contract to procure all necessary variances to further construction. Section 8.2.1 states that the "[t]ime limits stated in the Contract Documents are of the essence of the Contract." Thus, any delay that damages either party and is attributable to the other party must be construed as a breach. As such, Commonwealth has proved by a preponderance of the evidence that Cornerstone did not perform its obligations under the contract such that Commonwealth was delayed in commencing construction.

Moreover, Commonwealth has proven by a preponderance of the evidence that Cornerstone delayed Commonwealth's performance under the Agreement. The evidence at trial, introduced through the credible testimony of Commonwealth's witnesses, showed that there was an inordinate number of RFI's, COP's and CO's associated with this project. The evidence further shows that there were areas of the project that were delayed as a result of design changes because of inconsistencies in the design documents. A main contributing factor to these problems appears to have been the inexperience of Denise Pearce. While she may have significant experience in other fora, the evidence tends to show that she did not have the necessary experience to manage such a large project. While the large number of changes that needed to be made to the project may not *per se* cause delay that would breach a contract, this Court finds that the number of changes along with the inconsistencies in the design documents, shows that there were forces that were not within Commonwealth's control, yet within the control of Cornerstone, that delayed the project. Sufficient evidence has been brought forth to show that Cornerstone breached the contract by delaying the

[198] *Id.* at § 2.2.2.

commencement of construction due to lack of the proper variances, which, in the end, were necessary because of the design documents. Also, Commonwealth has sufficiently proved that Cornerstone's inexperience in managing such a large project, illustrated through the number of changes needed to the design documents, caused the delay and caused damage to Commonwealth in the form of additional general conditions, which were needed to maintain the worksite. Benjamin Vinton provided competent and credible testimony as to the calculation of the direct costs expended by Commonwealth as a result of the delay.[199] Therefore, on the present record, Commonwealth is entitled to its claim of additional general conditions in the amount of $95,311 for the time and energy and equipment that was expended, in other words, the damages that resulted from the delay of the commencement and the performance of the project.

ii. Cornerstone's Failure to Pay Commonwealth for Work That Was Complete.

The payment process was described in some detail above, but the clearest rendition of the procedure through which Commonwealth applied for payment is set out in the General Conditions. Commonwealth has proven, as shown above, by a preponderance of the evidence that it is entitled to the payments in the outstanding pay applications because the work was completed. Therefore, this Court finds that Cornerstone materially breached the terms of the Agreement by not paying Commonwealth for work performed. Cornerstone did not set forth sufficient evidence that the work that Commonwealth billed for in the disputed pay applications was not completed. Cornerstone only succeeded in proving that they disputed a lot of the actions taken by Commonwealth during the course of the project, but Cornerstone has not shown that Commonwealth materially breached the Agreement and, thus, the Church is not excused from following the terms of the Agreement.

iii. Cornerstone's Failure to Submit Claims to The Architect.

The General Conditions also lays out the procedure that both parties must follow when there is a dispute between the parties. Section 4.3.1 generally defines a claim as "a demand or assertion by one of the parties

[199] Testimony of Benjamin Vinton 60 (Dec. 14, 2005, a.m.).

seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." During the pendency of these claims, "the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents."[200] As stated above, all claims shall be initially referred to the Architect, Desmond Baker.[201] Moreover,

> [a]n initial decision by the architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect.[202]

A condition precedent is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises."[203] A condition precedent is not a favorable result when interpreting a contract as failure to comply with the condition precedent generally results in a forfeiture.[204] However, where the contract language is clear and unambiguous, the Court must give that language its plain meaning.[205]

Although it appears that no Delaware cases have addressed the issue of whether a party materially breached the contract by not submitting a claim to the Architect prior to pursuing the claim in litigation, a case from an Illinois court of appeals is persuasive here.[206] In a similar contractual situation where disputes went to the Architect, the *Mayfair* court held that the owner's failure to submit a claim to the architect as a precondition to alternative dispute resolution or litigation was a material breach was of the contract as it deprived the contractor of the "bargained-for right to quick resolutions by a third party with specialized experience in construction issues[.]"[207] The effect of requiring mandatory submission of claims to an

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[200] General Conditions § 4.3.3.

[201] *Id.* at § 4.4.1.

[202] *Id.*

[203] *AES Puerto Rico, LP v. Alstom Power, Inc.*, 429 F.Supp.2d 713, 717 (D. Del. 2006) (applying Delaware law).

[204] *Stoltz Realty Co. v. Paul*, 1995 WL 654152, * 9 (Del. Super.).

[205] *See AES Puerto Rico*, at 717.

[206] *Mayfair Contr. Co. v. Waveland Associates Phase I Ltd. P'ship*, 619 A.2d 144 (Ill. App. Ct. 1993).

[207] *Id.* at 202.

architect as a condition precedent to litigation, or even alternative dispute resolution, allows claims to be disposed of quickly and efficiently by an experienced arbiter.

However, that is not what happened here. The evidence does not show that Cornerstone ever submitted a formal claim to Desmond Baker, as was required by the General Conditions. Instead, Mr. Baker's testimony only shows that he and Cornerstone had ongoing negotiations.[208] Moreover, the language of the contract is clear that a condition precedent to bring a claim in litigation or in the context of alternative dispute resolution is submission of the claim to the Architect. Under *Mayfair* and the plain language of the Agreement, failure to do so constitutes a material breach of the contract. Therefore, Cornerstone materially breached the Agreement by failing to formally submit any of its claims to the Architect.

In that vein, Commonwealth's filing of a claim for a mechanic's lien, which included the breach of contract claim, did not breach the Agreement. Under § 4.4.8, ""[i]f a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration."[209] Therefore, as the primary cause of action was a mechanic's lien, Commonwealth did not breach the contract. Moreover, in Delaware, *in personam* claims, such as breach of contract, are able to be filed concomitantly with the claim for the mechanic's lien.[210] Thus, Commonwealth did not breach the Agreement when it filed the claim for the mechanic's lien or when it included the breach of contract claim in the complaint.

iv. Commonwealth Did Not Breach the Agreement By Stopping Work.

The present record is replete with allegations, some substantiated, of non-payment and breach of contract and delay. But all of the fighting back and forth between the two parties eventually, although, in hindsight, not unexpectedly, resulted in something that would hinder the intent of the

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[208] Testimony of Desmond Baker 10 (Dec. 20, 2005).

[209] General Conditions § 4.4.8.

[210] *See Neukranz v. Delaware Lumber & Millwork, Inc.*, 1998 WL 442847 (Del. Super.) (citing amendment to 12 *Del. C.* § 2712).

Agreement, the construction of the place of worship. The deteriorating relationship between Commonwealth and Cornerstone finally, on October 18, 2004, culminated in a work stoppage. Commonwealth's primary reason for stopping work was because Cornerstone was not paying the outstanding, and in some cases agreed-upon, pay applications.[211]

However, this Court finds that, as a result of its above holding that Cornerstone breached the Agreement because it improperly withheld payments for work that had been completed, Commonwealth did not breach the Agreement by stopping work.

The Agreement states that

> If the Architect does not issue a Certificate of Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect, … then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received.[212]

The evidence shows that Cornerstone and Desmond Baker, as a representative of the Church, did not comply with the Agreement regarding payments and, thus, Commonwealth was entitled to stop work. Commonwealth also complied with the written notice requirements when Benjamin Vinton sent an email to Samuel Pratcher that invoked § 9.7.1 on October 5, 2004.[213] On that date, Cornerstone was put on notice of Commonwealth's right to stop work on the grounds of non-payment for work completed. Therefore, Commonwealth's work stoppage pursuant to § 9.7.1 of the General Conditions was justified and done in accordance with the Agreement; thus, Commonwealth did not breach the Agreement when it stopped work as a result of non-payment.

Further, as a result of the stoppage, Cornerstone alleges that it is entitled to consequential damages. However, under the Agreement, both parties waived consequential damages. A reading of the plain language of section 4.3.10 of the General Conditions supports that proposition.

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[211] Testimony of Benjamin Vinton
[212] General Conditions § 9.7.1.
[213] PX 32.

Cornerstone alleges that that provision does not apply because Commonwealth terminated the Agreement. However, that is not accurate as Commonwealth stopped work on the project but did not terminate the Agreement. Thus, both parties signed the Agreement that clearly provides for a mutual waiver of consequential damages, except under certain situations that are not present here. Both parties must be held to the plain language of the document.

v. Cornerstone is not entitled to the credits it seeks.

Cornerstone is not entitled to the credits it seeks based on two independent bases. First, because Cornerstone did not submit its claims to the Architect as required by the Agreement as a condition precedent to litigation of alternative dispute resolution, as discussed above, Cornerstone is in material breach and cannot now bring such claims. Second, even if Cornerstone's claims for credits are properly raised in this Court, then they also fail as Cornerstone has not proven their existence and Cornerstone's entitlement by a preponderance of the evidence.

First, the Agreement mandates that submission of claims to the Architect is a "condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due[.]"[214] As discussed above, failure to satisfy a condition precedent results in a forfeiture of that party's rights under the contract. It is clear, from the evidence adduced at trial that Cornerstone never filed a formal claim with Desmond Baker, as required under section 4.4.1 of the General Conditions. Therefore, Cornerstone cannot now claim in this Court that it is owed credits by Commonwealth when it never formally submitted those claims to Desmond Baker, pursuant to the requirements of the contract. On that ground, Cornerstone's claims for credits owed must fail.

Second, Cornerstone has not only failed to put forth sufficient credible evidence that the credits exist, nor have they proved that they are entitled to the credits. Cornerstone only manages to assert that they should be entitled to the credits, but fails to prove by a preponderance of the evidence, through credible testimony of its witnesses, that the credits in fact exist and that Cornerstone is entitled to them.

[214] General Conditions § 4.4.1.

For example, Cornerstone alleges that it is entitled to a credit totaling $14,419 for various permit allowances, HVAC balancing and support and a sprinkler system that was allegedly never installed.[215] However, Cornerstone offers no supporting factual authority for these claims nor does it point to any relevant part of the Agreement to support its claims for credits. Cornerstone does, however, rely on § 7.3.9 of the General Conditions for the proposition that when the parties agree with an adjustment made to the Contract Sum and Contract Time, "such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order." But that provision gives Cornerstone little solace as it is dependent upon an agreement between the parties. Here, there was never an agreement between Commonwealth and Cornerstone that would allow Cornerstone to invoke the above provision. Thus, Cornerstone's argument that Commonwealth did not execute Change Orders when credits allegedly came due to Cornerstone must fail.

One credit that was agreed upon by the parties and was then memorialized by the parties is the credit that Commonwealth offered as an incentive to Cornerstone to allow Commonwealth to perform Phases II and III concurrently, thus reducing general conditions expenses. There is sufficient evidence to show that these Change Orders were valid and that the $20,000 existed. However, there is also evidence, introduced through Commonwealth's credible witnesses, that the delay that this Court found was attributable to Cornerstone, caused the two Phases not to be performed concurrently but, instead, consecutively. Thus, Cornerstone is not entitled to the $20,000 credit. Instead, Commonwealth is entitled to the amount of the incentive as the purpose behind the incentive, as was shown by evidence put forth by Commonwealth's witnesses at trial, was not achieved.

Finally, Cornerstone's claim that they are owed almost $100,000 for subcontractors that it has retained as a result of Commonwealth's work stoppage. Apparently those subcontractors have also field mechanic's liens against the Church. However, although Cornerstone alleges that Commonwealth's breach caused Cornerstone to hire other subcontractors, this Court has held that Commonwealth is not in breach of the Agreement. Moreover, Cornerstone alleges that Commonwealth has "certified its payments to the subcontractors and cannot be heard to say there is no liability to them[,]" but Cornerstone offers no factual or legal support for

[215] Def.'s Ans. Br. 31.

such a contention.[216] Thus, this Court finds that there is no merit to Cornerstone's claim that Commonwealth responsible for any damages Cornerstone may have incurred by hiring other subcontractors.

vi. Conclusion

Therefore, it appears to this Court that Cornerstone materially breached the contract by failing to pay outstanding pay applications and by failing to submit claims to the Architect as a condition precedent. This Court further finds that Commonwealth did not breach the Agreement and that it substantially complied with the terms of the Agreement. Thus, Commonwealth is entitled to $95,311 in additional general conditions as a result of delay that is attributable to Commonwealth and to $20,000 representing the incentive that was not able to be fulfilled as a result of Cornerstone's delay. Thus, for its breach of contract claim, Commonwealth is entitled to an award of $115,311.

c. Cornerstone's Fraud Claim Fails.

To sustain a claim of common law fraud, a party must allege:

> (a) false representation, usually one of fact;
> (b) the defendant's knowledge or belief that the representation was false, or made with reckless indifference to the truth;
> (c) an intent to induce the plaintiff to act or refrain from acting;
> (d) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> (e) damage to the plaintiff as a result of such reliance.[217]

Superior Court Civil Rule 9(b) requires that "[i]n all averments of fraud … the circumstances constituting fraud … shall be stated with particularity." Such particularity requires, even where fraud is pled as an affirmative defense, that the party averring fraud must provide the time, place and contents of the fraudulent act or omission, as well as the person who gave the false representation.[218] If such a claim is not pled with sufficient particularity, then it will be dismissed.

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[216] *Id.* at 40.

[217] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

[218] *See Nat'l Homes Mortg. Corp. v. Milton Land & Realty Co.*, 1986 WL 15417, * 2 (Del. Super.).

This Court finds that the allegations of fraud, as they are pled in Defendant's Fourth Amended Answer and as they were presented in the counterclaim at trial, were not plead with sufficient particularity. The allegations in Cornerstone's answer do not sufficiently identify specific representations that could be construed as fraudulent. Additionally, Cornerstone failed to satisfy all of the elements of common law fraud, listed above, with the evidence introduced at trial. There was no evidence introduced at trial, nor any citation in the Church's post-trial briefs, that indicated that Commonwealth had made false representations to Cornerstone in order to "induce the plaintiff to act or refrain from acting." Cornerstone, in support of its position that its claim of fraud should not be dismissed, merely "incorporates its Arguments set forth in its Counterclaims."[219] Cornerstone had the burden of proving fraud at trial and pleading fraud with particularity in its answer; this Court finds, however, that Cornerstone came up short on both accounts.

As an alternative and independent ground for the failure of Cornerstone's claim of fraud, Cornerstone failed to submit such claims of fraud to the Architect, Desmond Baker. Under § 4.4.1 of the General Conditions, "[c]laims … shall be referred initially to the Architect for decision." There is no evidence that Cornerstone submitted any claims to the Architect regarding the allegations of fraud that were pled in Cornerstone's Fourth Amended Answer. Thus, this Court finds that, because Cornerstone failed to submit its fraud claims to the Architect prior to this litigation, under the plain language of the Agreement, such claims should be dismissed.

d. Attorney's Fees

Both parties seek an award of attorney's fees. Generally, Delaware follows the American Rule, which expects the prevailing party to pay its own attorney's fees.[220] However, there are exceptions to the rule, such as the bad faith exception. The Delaware Supreme Court has held that "[a]lthough there is no single definition of bad faith conduct, courts have

[219] Def.'s Ans. Br. 25.

[220] *Johnson v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 545 (Del. 1998).

found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims."[221]

Here, this Court finds that an award of attorney's fees is not appropriate. Commonwealth has much more of a potential basis to seek an award of attorneys' fees than does Cornerstone. However, none of the above-mentioned circumstances set forth in *Johnson* constituting bad faith are present here. The Court believes that Cornerstone essentially had an unrealistic view as to the strength of its case, but that fact does not warrant an award of attorneys' fees to Commonwealth.

V. CONCLUSION

For the foregoing reasons, this Court finds in favor of Plaintiff/Counterclaim-Defendant Commonwealth Construction Co. on its claim for a mechanic's lien in the amount of $251,031.

This Court also finds in favor of Commonwealth on its *in personam* breach of contract claim in the amount of $115,311.

This Court enters judgment against Cornerstone on its counterclaim.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary

[221] *Id.* at 546.